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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 498.

BROOKLYN EAGLE, INC.,

Petitioner,

vs.

M. MICHAEL POTOKER, as Secretary-Treasurer of Newspaper Guild of New York, Local 3, ANG, CIO,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HERMAN E. COOPER,
COOPER, OSTRIN & DE VARCO,
Attorneys for Respondent,
635 Madison Avenue,
New York 21, New York.

OF COUNSEL:
HERMAN E. COOPER,
H. HOWARD OSTRIN,
EUGENE N. SOSNOFF.

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondent Newspaper Guild opposes the granting of a writ of certiorari on three grounds:

(1) The federal question was not timely raised in the state court.

(2) The record is devoid of evidence that the parties are subject to the Labor Management Relations Act, 1947.

(3) The LMRA does not divest state courts of jurisdiction over proceedings to compel arbitration.

Proceedings in the New York Courts.

The Civil Practice Act of the State of New York (Article 84, Section 1448 *et seq.*), provides a summary procedure for the enforcement of arbitration agreements. In accord-

ance with this provision, Respondent, in April 1955, moved in the New York County Supreme Court for an order directing Petitioner to arbitrate a demand on behalf of 315 employees for severance, dismissal, vacation, overtime and holiday pay (folios 17-54).*

The motion was granted in part and denied in part (Appendix, pp. 18-21). Thereafter, successive appeals were taken to the Appellate Division of the Supreme Court, First Department (Appendix, pp. 22-27), and the New York Court of Appeals (Appendix, pp. 28-36). Both appellate courts sustained Respondent's contentions in their entirety and directed Petitioner to arbitrate all disputed claims.

The litigation up to this point spanned a period of nearly two years. Throughout this entire time Petitioner never once claimed that the New York courts lacked jurisdiction over the controversy.

The majority opinion of the Court of Appeals concludes with the statement: "On this record we are satisfied that the motion to compel arbitration was properly granted. We pass on no other question" (Appendix, p. 32).

Not until a month after the Court of Appeals had announced its decision was the first and only attempt made to introduce even the semblance of a federal question. Then, on a motion for leave to reargue or, in the alternative, to amend the remittitur, Petitioner belatedly raised the question of whether under Section 301 of the Labor Management Relations Act, 1947, federal courts have exclusive jurisdiction over actions to compel arbitration (Appendix, pp. 37-40).

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* The reference is to folios of the record of the New York Court of Appeals.

Summary of Facts.

By letter dated September 1, 1954, Respondent served notice on Petitioner of its desire to modify their collective bargaining agreement, which by its terms was to expire on November 29, 1955 (folios 37-9). After weeks of fruitless negotiations, no settlement was reached by that date (folio 71), and from then on Respondent's right to strike was absolute.

Nevertheless, of its own volition Respondent relinquished the immediate and unqualified opportunity to take strike action, and all employees remained at work as efforts to reach a settlement continued (folio 71). On January 28, 1955, despairing of a peaceful solution after almost five months of futile negotiations, the employees struck (folio 71). Negotiations, however, continued by mutual desire and consent.

The strike was in all respects lawful. At the time, Petitioner neither protested nor challenged Respondent's right to call it. Present assertions that the strike violated the agreement are unsupported as well as immaterial.

On March 16, 1955, Petitioner unilaterally terminated negotiations and discharged all employees. It stated in a letter of that date addressed to Respondent (folios 40-45):

> "We agree that further negotiations will be futile, and we elect to, and hereby do, terminate them forthwith.
>
> • • • • • •
>
> ". . . we do not intend ever to resume publication of the newspaper.",

Upon Petitioner's rejection of claims for severance, vacation, dismissal, holiday and overtime pay on behalf of the discharged employees, Respondent in accordance with

Section 21 (b) of the agreement demanded arbitration of the controversy (folios 46-51). Petitioner's refusal to arbitrate (folios 52-54), resulted in Respondent's motion to compel arbitration under Article 84 of the New York Civil Practice Act (folios 18-54).

POINT I.

The federal question was not timely raised below nor was it considered and this Court therefore lacks jurisdiction to review it on appeal.

The only federal question asserted below—and that on an application for leave to reargue—was that Section 301 of the Labor Management Relations Act, 1947 totally ousted state courts from jurisdiction of actions to compel arbitration between employers and labor unions in interstate commerce.

At this late date, Petitioner contends that a second federal question was raised below, namely: Does a strike, allegedly in violation of a collective agreement, result in automatic termination of employment? We will later show that this point, while urged in the form of a defense to the motion to compel arbitration, was never raised as a federal question.

On the basis of the record, we believe that the jurisdiction of this Court cannot be invoked. As was said in *Bowe v. Scott*, 233 U. S. 658, 663 (1914):

> "... it is elementary that a mere assertion in a state court of a right under the Constitution of the United States in a petition for rehearing affords no grounds for invoking the jurisdiction of this court unless the court below in dealing with the petition for rehearing considers and passes upon the Federal ground therein relied upon...."

Similar holdings are legion, e.g.:

St. Louis and San Francisco RR. Co. v. *Shepherd*, 240 U. S. 240 (1916);

Herndon v. *State of Georgia*, 295 U. S. 441 (1935);

Forbes v. *State Council*, 216 U. S. 396 (1909);

McMillen v. *Ferrum Mining Co.*, 197 U. S. 343 (1905).

The following is undeniable from the record:

(1) The question of exclusive jurisdiction of the federal courts was first presented in an application to the Court of Appeals for reargument or in the alternative to amend the remittitur (Appendix, pp. 37-40).

(2) The order of the Court of Appeals denied without comment both the request for reargument and the request to amend the remittitur (Appendix, p. 47).

We think that the order on its face shows that the federal question was not considered. This is emphasized by the refusal of the court to amend the remittitur. In its brief in support of the application for reargument or amendment of the remittitur, Petitioner closed with the following statement to the Court of Appeals:

> "Should the Court disagree with our construction of the United States Supreme Court decisions and our interpretation of the state of the law today, we respectfully ask, in the alternative to our request for reconsideration, that this Court amend the remittitur and certify that it has considered the question posed in these papers.
>
> It is our intention, if the first branch of this motion is denied, to apply for a writ of *certiorari* to the United States Supreme Court, and we desire

> the record to show that this point has been presented."

Plainly, by declining to amend the remittitur in the face of these remarks, the Court of Appeals must have intended to make it clear that it was not considering the question posed.

In a tortuous effort to establish that the question was considered, Petitioner includes in the Appendix (p. 41), a letter dated June 7, 1957, from the Clerk of the Court of Appeals, advising counsel that they may "if they so desire" comment on the recent decisions of this Court in *Goodall Sanford, Inc.* v. *United Textile Workers of America; General Electric Co.* v. *Local 205, United Electrical Workers; Textile Workers Union of America* v. *Lincoln Mills of Alabama.*

This letter, we submit, no more constituted passing upon a federal question than did the denial of a petition for rehearing "on mature consideration." *Forbes* v. *State Council,* 216 U. S. 396, 399. As this Court there stated:

> "But it must appear that such federal question was in fact passed upon in considering the motion for rehearing; if not, the general rule applies."

The second purported federal question that the employees automatically severed their employment by allegedly striking in violation of the agreement was, as we have already stated, never raised below as a federal question.

In its main brief to the Court of Appeals, Petitioner as a defense to the motion to compel arbitration, attempted to develop the argument that:

> "No valid claims for Severance Indemnity, Notice of Dismissal Pay and Vacation Pay ever came

into existence, because the Union's members voluntarily severed their employment with the Company by going out on strike on January 28, 1955" (headnote to Point VI of Petitioner's brief).

As authority for this argument Petitioner cited several federal cases, all involving enforcement proceedings by the National Labor Relations Board.

Petitioner's position in this regard was untenable. The strike was in every respect lawful, and neither in law nor fact constituted a voluntary severance of employment, nor had Petitioner ever treated it as such. Indeed, in its brief to the Court of Appeals, Petitioner stated (at p. 14):

> "... as we have pointed out, it is not our position that the case turns on the question whether the calling of the strike on January 28, 1955, was a breach by the union of its contract."

It is, however, unnecessary to document either our contentions or Petitioner's on the point. The fact is that neither side was arguing a federal question. What was being argued was an affirmative claim that arbitration should be denied because the employees had terminated their employment before they became entitled to severance, dismissal and vacation pay. In the course of the argument some federal authority was cited by both sides to support their respective positions. We also relied on state authority and common law prior to the enactment of any state or federal labor statute.

The Court of Appeals held only that the defense was insufficient to preclude arbitration. It did not make this limited ruling by deciding a federal question. It simply pointed out that "whether or not the Guild called a strike in breach of the 'no strike' clause constitutes no defense to this motion to compel arbitration" (Appendix, p. 32).

Parenthetically the court stated: " . . . it has long been the rule that striking employees do not lose their status as employees" (Appendix, p. 32). It took pains, however, to clarify in the plainest language that it was not deciding whether either side was right or wrong about any substantive issue, but only whether there were questions for arbitration. "The question of performance," said the court, "goes to the merits and is a matter for the arbitrators whenever it appears that the parties have so consented" (Appendix, p. 31). On the record before it, the court was satisfied "that the motion to compel arbitration was properly granted." It was passing "on no other question" (Appendix, p. 32).

POINT II.

The record is devoid of evidence that the parties are subject to the Labor Management Relations Act, 1947.

A prerequisite to the existence of a federal question is a finding predicated upon allegations and proof that the parties are subject to the Labor Management Relations Act, 1947.

The record emphatically demonstrates the absence of any allegation, claim, effort to prove or finding that the parties are subject to the LMRA.

Assuming a critical jurisdictional fact not established by the record, Petitioner states:

> "It is not disputed that in the instant situation the Guild is a 'labor organization' representing employees in an industry affecting commerce and as such is subject to the provisions of the Labor-Management Relations Act, 1947." (Petition, p. 6.)

It then proceeds to extract from the record two stray items upon which it exclusively rests the assumption.

The first is a sentence in the collective bargaining agreement which states that: "The parties agree to abide by the (arbitration) award subject to such rules and regulations as any Federal agency having jurisdiction may impose."

Vague and indefinite on its face, this sentence manifestly expresses doubt as to whether the parties regarded themselves as subject to the jurisdiction of "any Federal agency." It represents nothing more than an undertaking that an arbitration award shall not conflict with the rules and regulations of some federal agency such as a war time wage stabilization board which *might* have jurisdiction under the national war powers of the federal government.

Moreover, even if the parties assumed that some federal agency had jurisdiction, the assumption is no proof of the fact, and it is certainly no proof that the parties are subject to the LMRA.

The second item relied upon by Petitioner as proof of the applicability of the LMRA is the opening paragraph of a letter received from Respondent dated September 1, 1954, which states (folios 37-38):

> "Pursuant to the provisions of the Labor-Management Relations Act, 1947, you are hereby notified that the Newspaper Guild of New York desires to modify the collective bargaining contract now in effect between The Brooklyn Eagle, Inc. and the Guild, which contract is dated November 30, 1952 and has a formal expiration date of November 29, 1954."

In writing this letter, Respondent of course was insuring itself against the possibility that section 8(d) of the Act (29 U. S. C. A. §158(d)) requiring 60 days notice of con-

tract termination, might at some future time be held applicable to it.

That Respondent did not concede the applicability of the LMRA is indisputable from the closing paragraph of the same letter, which reads (folios 38-39):

> "You are further advised that while this notice is given under the Labor Management Relations Act, 1947, the undersigned waives none of its rights and expressly reserves all objections to the constitutionality, validity and applicability of the Labor Management Relations Act, 1947, and of each and all provisions of said Act."

The only reference in the record to the LMRA is found in Respondent's letter of September 1, 1954. Consequently, the Appellate Division's observation that notice of contract modification was given "pursuant to the provisions of the Labor-Management Relations Act, 1947" (Petition, p. 6), is necessarily qualified by the letter's concluding paragraph. Small comfort can be gleaned by Petitioner from the observation.

Because the applicability of the LMRA has not been established, the Petition suffers from a basic jurisdictional infirmity and should therefore not be entertained.

POINT III.

The claim that federal courts have exclusive jurisdiction over proceedings to compel arbitration is without merit.

State and federal courts commonly share concurrent jurisdiction in civil actions where federal substantive law is controlling.

Typical instances where this occurs are personal injury suits by seamen under the Jones Act (46 U. S. C. A. §688),

O'Donnel v. *Great Lakes Dredge Dock Co.*, 318 U. S. 36 (1943); suits for unpaid minimum wages or overtime under the Fair Labor Standards Act (29 U. S. C. A. §201), *Emerson* v. *Mary Lincoln Candies*, 287 N. Y. 577 (1941); suits for penalty wages under the federal shipping law (46 U. S. C. A. §596); *Cox* v. *Lykes Bros.*, 237 N. Y. 376 (1924).

When Congress intends federal courts to have exclusive jurisdiction, it is usually explicit on the subject. Thus, in suits involving patents and copyrights, Congress provided (28 U. S. C. A. §1338), that the jurisdiction of federal district courts shall be "exclusive of the courts of the states."

Both the language and legislative history of Section 301 clearly establish that it was never the intention of Congress to vest exclusive jurisdiction in the federal courts over actions to compel arbitration.

The provision (quoted in full, Appendix, p. 13) is phrased in permissive rather than mandatory language. "Suits for violation of contracts," states Section 301, "may be brought in any district court." The key word, of course, is "may," which is far different than "must." "May" clearly envisions that the jurisdiction of district courts is not absolute or exclusive.

In reviewing the legislative history of Section 301, the majority opinion in *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U. S. 448 (1957), noted that "a primary concern" of Congress was "that unions as well as employers should be bound to collective bargaining contracts" (p. 453). There was, however, a "broader concern," which was described as a "concern with a procedure for making such agreements enforceable in the courts by either party" (p. 453). This reference to "procedure" apparently was directed at the obstacles existing in the laws of many states to suits against labor unions as

unincorporated associations. Earlier in the opinion, this was described as the "procedural remedy lacking at common law," at p. 451.

The majority quoted from the Senate Report dealing with Section 301 to the effect that: "'We feel that the aggrieved party should also have a right of action in the Federal courts'" (S. Rep. No. 105, 80th Cong., 1st Sess., p. 15). This statement emphatically demonstrates that the jurisdiction Congress intended to confer on federal courts by Section 301 is an "also" or concurrent jurisdiction which does not destroy or supersede time-honored state jurisdiction in the same field.

Article 84 of Civil Practice Act of the State of New York was originally enacted in 1920. Since that time, and continuing to the present, New York courts have entertained motions to compel arbitration under collective agreements. We state without fear of contradiction that since the enactment of the LMRA, literally hundreds of proceedings to compel arbitration have been disposed of by the New York courts.

Petitioner's contention that the "fair implication" of this Court's decision in the *Lincoln Mills* trio of cases is that federal courts have exclusive jurisdiction over the enforcement of arbitration provisions in collective agreements affecting commerce is, in our view, unsupportable.

The precise issue before this court in all three cases was whether the federal courts were empowered under Section 301 to adjudicate suits for specific performance of arbitration provisions in collective bargaining agreements.

This court held that Section 301 vests authority in federal courts to hear such controversies, and that appropriate federal substantive law and remedies would have to be formulated to resolve them. We have no quarrel with this result; in fact, we welcome it.

However, to say that federal courts have jurisdiction over actions to compel arbitration is not to say that their jurisdiction is exclusive. We seriously doubt that Congress ever intended to oust state courts from their traditional juridical authority in this area.

As we have already shown, in numerous instances private litigants bring suits in state courts to enforce rights based on federal statutes, and the state courts, exercising concurrent jurisdiction, apply federal law.

That the decision of the New York Court of Appeals is consistent with federal substantive law is best demonstrated by *Goodall-Sanford Inc.* vs. *United Textile Workers of America*, 233 F. 2d 104 (C. A. 1 1956), aff'd 353 U. S. 550 (1957). In that case, Chief Judge Calvert Magruder, speaking for a unanimous court and citing with approval the instant case, directed arbitration.

Conclusion.

The petition for a writ of certiorari should be denied.

Dated: October 14, 1957.

Respectfully submitted,

HERMAN E. COOPER,
COOPER, OSTRIN & DE VARCO,
Attorneys for Respondent,
655 Madison Avenue,
New York 21, New York.

Of Counsel:
HERMAN E. COOPER
H. HOWARD OSTRIN,
EUGENE N. SOSNOFF.